MAY 4 - 2010

No. 08-1314

In the Supreme Court of the United States

DELBERT WILLIAMSON, ET AL.,

Petitioners,

v.

MAZDA MOTOR OF AMERICA, INC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division Three

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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SUPPLEMENTAL BRIEF FOR RESPONDENTS

Pursuant to this Court's Rule 15.8, respondents submit this brief in response to the *amicus curiae* brief of the United States. The government's brief is peculiar in several respects. Although conceding that the lower courts are in complete agreement on the issue presented here, the government urges the Court to review this case because it would like the Court to reject an argument that the court below did *not* adopt and that respondents have *never* urged. And it proposes that the Court use this case to resolve a disagreement between *other* lower courts over issues that are *not* presented here – disagreements that, on examination, prove largely chimerical. The government's strained presentation confirms that this case does not warrant the Court's attention.

A. The Lower Court Decisions Interpreting FMVSS 208 Are In Agreement And Are Consistent With *Geier*.

1. The government acknowledges that there is no conflict in the lower courts on the issue actually presented in this case: whether FMVSS 208 preempts a state tort claim that a vehicle manufactured in 1993 was defectively designed because it lacked a type 2 seatbelt in one rear seating position. U.S. Br. 8, 17. On that, the government plainly is correct. Each of the six appellate decisions to address this question – indeed, each of the 18 federal or state judges to consider the question on appeal – has found preemption warranted.[1] That concession is reason enough to deny the petition.

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[1] In those six decisions, en banc rehearing was sought in the three federal cases and state high court review in the three

2. In nevertheless urging review of the decision below, the government insists that each of these decisions held state law preempted by federal rules "that set only minimum standards" (U.S. Br. 8), that these asserted holdings "over-read" *Geier* (*id.* at 17-18), and that this "over-reading" departs from the government's longstanding view "that a minimum safety standard provided in a FMVSS, without more, does not conflict with a stricter state requirement." *Id.* at 15. But this argument is flawed for a basic reason: these decisions did *not* hold that minimum federal standards, without more, preempt stricter state rules. Instead, each court in these cases closely examined the purpose and regulatory history of FMVSS 208 and concluded that state liability would frustrate particular, deliberately adopted federal policies. None of these decisions adopted the "minimum standard" approach to preemption criticized by the government; respondents did not below, and do not now, advocate it. See Resp. Br. 2-3, *Williamson v. Mazda Motor Corp.*, No. G038845 (Cal. Ct. App. Apr. 1, 2008) (describing "NHTSA's policy reasons," "includ[ing] compatibility with child safety seats," why "FMVSS 208 is a comprehensive regulatory scheme, and not a minimum safety standard"). Thus, the issue the government urges the Court to decide – whether "NHTSA's decision to allow [manufacturers a choice of] options, standing alone, * * * compel[s] a *finding* of preemption" (U.S. Br. 18) – is simply not presented here.

In contending otherwise, the government contents itself with brief parenthetical snippets from those decisions. U.S. Br. 18. But a review of the rea-

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state cases; no judge on any court expressed disagreement with the panel or suggested that further review was warranted.

soning actually used by those courts paints a very different picture.

The first post-*Geier* decision to address FMVSS 208's application to seatbelts involved the rule that manufacturers of heavy buses need provide only a type-1 seatbelt for the driver. In that case, Judge Wood wrote for a unanimous Seventh Circuit that "NHTSA's decision to leave the manufacturers of heavy buses with the option of using a two point seat belt * * * is quite understandable as a way of promoting safety by encouraging drivers to use the safety equipment that manufacturers install", liability for failure to install a three-point belt "could reduce [seatbelt] utilization and thereby undermine FMVSS 208's safety objective." *Hurley*, 222 F.3d at 382. For this reason, the court found that, "as in *Geier*, the decision to leave options open to bus manufacturers was made with specific policy objectives in mind. Hurley's suit, if successful, would undermine that policy objective and is therefore preempted." *Ibid.*

The subsequent decisions cited by the government likewise examined, specifically and in detail, the policy and administrative background of FMVSS 208. In *Roland*, for example, the court found it

> clear that NHTSA's regulation of seat belt use was motivated by the same policy concerns that the Supreme Court identified in *Geier* as the basis for the agency's decision to permit various passive restraint options: safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments.

881 N.E.2d at 727.

The court pointed specifically to regulatory history suggesting that "requiring Type 2 belts is not the best approach for providing maximum safety protection for children," that requiring use of such belts "in all rear seat locations could result in lost opportunity to improve vehicle safety through other means," and that requiring use of such belts might "impede driver's rearward vision." 881 N.E.2d at 727 n.4. See *id.* at 728 ("FMVSS 208's extensive rule making history 'indicates that child safety concerns * * * played a part in the decision not to require lap/shoulder belts in rear seating positions.'"). The court therefore held that a state-law tort action challenging a manufacturer's failure to include type-2 belts in a rear center seat "is pre-empted on the *narrow* grounds that it conflicts with the deliberate and comprehensive regulatory scheme set forth in FMVSS 208." *Id.* at 729. In reaching this conclusion, the court emphasized that it did *not* "find[] pre-emption based on the broader grounds that any regulation which affords a choice to a manufacturer pre-empts the state action." *Ibid.*

The remaining FMVSS 208 decisions, although offering varying amounts of detail on the regulatory history, likewise found that "the agency identified specific policy reasons for its decision" not to require type-2 seatbelts – including "child safety concerns" – and that this decision was part of a "comprehensive regulatory scheme" that would be frustrated by differing state rules. *Carden*, 509 F.3d at 531 & n.2, 532. See *Griffith*, 303 F.3d at 1281-82 (in a case involving a pickup truck, court relied on *Hurley*'s holding that state liability for failure to install type-2 seatbelts "'could reduce utilization and thereby un-

dermine FMVSS 208's safety objectives"); *Heinricher*, 809 N.E.2d at 1098 & n.6 (noting that "[o]ne of the reasons that the DOT decided to implement a rear seat lap-shoulder harness *option*, rather than a *requirement*, was its desire not to hinder the development of other safety advancements," and that state liability for failure to install a type-2 belt therefore "would conflict with and stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in Standard 208").

The holding below in this case relied on each of these decisions, and their analysis of the rulemaking record, to find that state liability would frustrate regulatory goals. The court began by applying "the traditional presumption against preemption." Pet. App. 8. But even against that background, the court found it "'clear that the agency's decision was deliberate and based on managing technological constraints and cost efficiency'" (*id.* at 17 (quoting *Carden*, 509 F.3d at 231-32)); the court pointed to *Roland*'s conclusion that the rule at issue here "'was motivated by the same policy concerns . . . identified in *Geier*,'" including "'safety and consumer acceptance (with respect to child restraints), technical difficulties (including issues as to anchor locations and possible interference with the rear view mirror), and lowering costs to encourage technological developments.'" *Id.* at 18 (quoting *Roland*, 881 N.E.2d at 727; ellipses added by the court). The court therefore held that state liability would "'stand as an obstacle to the implementation of the comprehensive safety scheme promulgated in [FMVSS] 208.'" *Id.* at 23 (quoting *Heinricher*, 809 N.E.2d at 1098. On the face of it, this is not the "preemption by minimum standard rule" that the government would like to challenge.

3. The question *actually* presented in this case is narrow: whether the court below correctly concluded that imposing state liability for failure to install a type-2 seatbelt in the aisle seat of a minivan would conflict with the agency's objectives in promulgating FMVSS 208. For several reasons, that question does *not* warrant review.

First, this issue is of limited and diminishing importance. Because there is no dispute about the controlling principle – all agree that preemption is required if state liability *would* interfere with regulatory policy (*see, e.g., Geier*, 529 U.S. at 875-76, 881-82) – resolution of this issue would turn on determining the agency's intent in promulgating the 1989 amendments to FMVSS 208 more than 20 years ago. And the answer even to that narrow question would have limited prospective importance because, as the government acknowledges (U.S. Br. 4 n.1), the standard at issue here has not applied to cars manufactured since September 1, 2007, all of which must have type-2 seatbelts at all forward-facing rear seating positions. Deciding the specifics of what the agency intended two decades ago regarding vehicles that are no longer manufactured, under a standard that has since been superseded, when the lower courts are in complete agreement on the question, would not be a productive use of this Court's resources.[2]

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[2] The government notes that "this Court granted review in *Geier* although by that time the question presented no longer affected new cars." U.S. Br. 19. As the Court explained, however, the lower courts were widely divided on the question whether the rule at issue in *Geier* was preemptive, with five federal courts of appeals (applying two different theories) holding that it was and five state courts of last resort holding that it was

Second, even if the question of the agency's intent in 1989 regarding use of type-2 seatbelts in rear seats were thought to warrant review, this case would not be a suitable one in which to resolve it. Although the government's presentation of the point is oblique, it recognizes that "this case involves the use of a Type 1 seatbelt in an aisle seat [of a minivan] rather than a true center seat." U.S. Br. 19 n.3. That consideration makes this case atypical, in ways that would be material to the preemption analysis. The agency identified unique safety justifications for not equipping aisle seats with type-2 belts, such as the need for passengers in the back row of a minivan to be able to exit the vehicle in an emergency without interference from a shoulder belt in or near the aisle. See 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989); 69 Fed. Reg. 70,904, 70,909 (Dec. 8, 2004). Decision of this case therefore could leave unresolved the preemption rule that applies to most of the vehicles still on the road that are subject to the 1989 amendments to FMVSS 208, which are sedans with rear center seats.

Third, the decision below is correct. There is ample support for the court's conclusion that the agency believed that allowing manufacturers to use *either* type-1 or type-2 seatbelts for inboard rear seats was necessary to overcome "technical difficulties," avoid "substantially greater costs," and promote "safety and consumer acceptance (with respect to child re-

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not. This Court "granted certiorari to resolve these differences." *Geier*, 529 U.S. at 866. Moreover, *Geier* presented unresolved and broadly applicable questions about the meaning of the preemption and savings clauses of the National Traffic and Motor Vehicle Safety Act of 1966. *Id.* at 867-874. Neither consideration is present here.

straints)"; indeed, the agency repeatedly expressed concern about the wide misuse and non-use of type-2 seatbelts with child safety seats and booster seats during the relevant period. Pet. App. 17-19. See, *e.g.*, 53 Fed. Reg. 47,982, 47,984-47,985 (Nov. 29, 1988) ("technical difficulties," "small safety benefits," and "substantially greater costs" for inboard rear seats); 54 Fed. Reg. 46,257, 46,258 (Nov. 2, 1989) (same); *ibid.* (type-2 belts would "cause entry and exit problems for occupants of seating positions to the rear of the aisleway seating position"); 69 Fed. Reg. 70,904, 70,909 (Dec. 8, 2004) (same); 54 Fed. Reg. 46,257, 46,262 (Nov. 2, 1989) (type-2 belts could discourage use of child safety seats). Given the universal agreement in the lower courts on these points, which confirms the correctness of the holding below, review of the question by this Court is unnecessary.[3]

B. There Is No Conflict In The Lower Courts On The Meaning Of *Geier*.

The government also urges the Court to grant review because a handful of lower courts disagree on whether *other* federal safety rules that are *not* at issue here have a preemptive effect, a disagreement that the government says reflects confusion "on how to apply the reasoning of *Geier* to claims of FMVSS preemption generally." U.S. Br. 17. Of course, even if

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[3] The government urges deference to its view. U.S. Br. 15-17. But that "[t]he government has consistently maintained that a minimum safety standard provided in a FMVSS 208, without more, does not conflict with a stricter state requirement" (*id.* at 15), is beside the point: the court below did not apply, and we do not urge, such a rule. The government has not previously expressed a view on FMVSS 208's preemptive effect in any rear seatbelt case, let alone in the rear aisle seat context presented here.

there were such a conflict, it would not be sensible to attempt to resolve it in this case, where it is not presented and did not affect the outcome below, and where the only disagreement between the parties is over how the controlling principle applies to the FMVSS 208 administrative record as it relates to type 2 seatbelts in rear aisle seats. But there is, in fact, no such fundamental confusion in the lower courts on "how to apply *Geier*'s reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options." *Id.* at 20. The decisions cited by the government establish no such confusion; they simply reveal disagreement about the intent underlying particular regulatory provisions. The courts in these cases used the approach advocated by the government here (U.S. Br. 9-17), determining the preemptive effect of the applicable provision of the FMVSS by examining its regulatory history and stated policies.

Thus the Fifth Circuit, in *O'Hara* v. *General Motors Corp.*, 508 F.3d 753 (2007), after a lengthy review of the regulatory history of FMVSS 205, concluded that this regulation did not preempt a claim that a vehicle was defective because it used tempered, rather than laminated, glass in side windows; distinguishing *Hurley*, where there was evidence "that the plaintiffs' safety enhancements would actually frustrate NHTSA's safety goals" (*id.* at 761), the Fifth Circuit found that FMVSS 205 was, in contrast to FMVSS 208, simply "a minimum safety standard." *Ibid.*[4] Accord *MCI Sales & Serv., Inc.* v.

[4] The government is wrong in hinting (U.S. Br. 20 n.4) that the Fifth Circuit's decision in *O'Hara* is inconsistent with its subsequent ruling in *Carden*. As noted in text, *O'Hara* relied on the Seventh Circuit's decision in *Hurley*, as did *Carden* (see 509

Hinton, 272 S.W.3d 17, 29 (Tex. Ct. App. – Waco 2008) (same, relying on *O'Hara*), review granted, No. 09-0048 (Tex. argued Mar. 24, 2010). Other courts have reached the contrary conclusion – *not* because they rejected the Fifth Circuit's analytical approach, but because they could not "agree with the *O'Hara* court's conclusion that FMVSS 205 is only a minimum standard and that there is no federal policy which would be frustrated." *Lake* v. *Memphis Landsmen, L.L.C.*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *7 (Tenn. Ct. App. Mar. 15, 2010). See *id.* at *8 ("It appears that the NHTSA left the options for glass open so that manufacturers could choose the safety features that best accomplished both purposes [of decreasing risk of ejection from the vehicle and injury from impact with glass]."); *Morgan* v. *Ford Motor Co.*, 680 S.E.2d 77, 94 (W. Va. 2009) (preemption because "NHTSA has indicated that glazing other than tempered glass can increase the risk of neck injuries in accidents"). That disagreement may or not some day warrant this Court's attention, but that day surely should await arrival of a case that actually presents the question.[6]

F.3d at 231). The petition for rehearing en banc in *Carden* argued as its principal point that *Carden* departed from *O'Hara*. See Appellants' Pet. for *En Banc* Reh'g at 5-11, *Carden* v. *General Motors Corp.*, No. 06-11182 (5th Cir. Dec. 17, 2007). The Fifth Circuit denied the petition, with no judge calling for a poll.

[6] The disagreement as to bus seatbelts identified by the government (U.S. Br. 20-21) similarly focused on the particulars of the regulatory intent. Compare *MCI Sales*, 272 S.W.3d at 26 (no preemption because "there is no federal regulation that addresses passenger seatbelts in motor coach buses") with *Lake*, 2010 WL 891867, at *10, 11 ("there was a federal policy not to require seatbelts" and state liability "would absolutely conflict

In this context, it is the government that "overreads" the cases when it proposes that these decisions "have noted the need for further guidance from this Court" and have "acknowledged confusion." U.S. Br. 21. As the language quoted in the government's brief itself demonstrates, the decision that the government cites for this proposition does not express the need for guidance; it expresses *disagreement* with *Geier*, the holding of which that court found to be all too clear. *Morgan*, 680 S.E.2d at 94. But no one in this case asks the Court to overrule or revisit *Geier* – least of all the government, which successfully urged the Court to adopt the *Geier* rule. Because there is no disagreement in the lower courts on the issue actually presented here, that issue is of limited and diminishing importance, and the holding below is correct, further review is not warranted.

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with Congress' goal of uniformity in the motor vehicle industry").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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